IN THE COURT OF APPEALS OF IOWA

No. 6-837 / 06-0366
Filed December 28, 2006

SANDRA VEACH,
Plaintiff-Appellant,

vs.

PRAIRIE MEADOWS RACETRACK & CASINO, INC.,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Plaintiff appeals the district court's grant of summary judgment to defendant on the basis that she failed to give timely notice of her dram shop claims. **AFFIRMED.**

Donald G. Beattie of Beattie Law Firm, Des Moines, for appellant.

Thomas L. Flynn and Dennis P. Ogden of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellee.

Considered by Mahan, P.J., and Vaitheswaran, J., and Robinson, S.J.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

ROBINSON, S.J.

I. Background Facts & Proceedings

On October 5, 2002, Douglas Kinney drove his vehicle into the south entrance of the Prairie Meadows Racetrack & Casino, Inc. Sandra Veach and Ardeth Klobnak were struck by Kinney's vehicle and injured in the incident. A preliminary criminal complaint against Kinney was filed in the Iowa District Court for Polk County on October 7. The complaint stated, "A preliminary breath test shows that the defendant's BAC was over the legal limit." Veach, who suffered neck and hip injuries, was released from the hospital on October 9. She hired attorney William R. Stiles later that day.

Stiles's records showed his office attempted to obtain copies of the police report on October 8, 10, and 11, November 5, and December 2, but was unsuccessful in obtaining a copy. Stiles stated his office usually cut out newspaper articles about cases his office was handling, but it had missed stories in *The Des Moines Register* about the incident which had appeared on October 6, 7, and 8. The October 8 story indicated Kinney was prohibited from driving a motor vehicle or consuming alcohol, an indication alcohol was a factor in the incident.

On November 1, 2002, Klobnak filed an action against Prairie Meadows alleging negligence and a violation of the Dram Shop Act, Iowa Code section 123.92 (2003). An article about her suit appeared in *The Des Moines Register* on December 27. In the article Klobnak's attorney, Donald Beattie, stated he

believed Prairie Meadows was liable under the dram shop law. Stiles missed seeing this article as well.

On April 3, 2003, Stiles and Veach met with Assistant Polk County Attorney Frank Severino to discuss Veach's proposed testimony at Kinney's criminal trial. At that meeting Severino stated Kinney's blood alcohol level was .141, and that a videotape showed him drinking at Prairie Meadows. Stiles and Veach had another meeting with Severino on April 28. On May 1, 2003, Veach sent notice to Prairie Meadows stating she intended to bring an action under section 123.92. She filed a petition against Prairie Meadows on May 12, 2004, bringing a dram shop action and a claim for negligence.

Prairie Meadows filed a motion for partial summary judgment, claiming Veach had failed to provide timely notice of her intent to file a dram shop action. Iowa Code section 123.93 requires that within six months of the occurrence of an injury, the injured person must give written notice of the person's intent to bring a dram shop action. The district court granted summary judgment on the dram shop claim. The court concluded Veach had failed to give timely, proper notice as required by section 123.93.

The case proceeded to a jury trial on the negligence claim. The jury returned a verdict finding Prairie Meadows was negligent, but its negligence was not the proximate cause of Veach's injuries. Veach now appeals the partial grant of summary judgment on the dram shop claim.

II. Standard of Review

We review a ruling on a motion for summary judgment for a correction of errors at law. Iowa R. App. P. 6.4. Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Kistler v. City of Perry*, 719 N.W.2d 804, 805 (Iowa 2006). A court should view the record in the light most favorable to the nonmoving party. *Eggiman v. Self-Insured Co.*, 718 N.W.2d 754, 758 (Iowa 2006).

III. Merits

Iowa Code section 123.93 provides:

> Within six months of the occurrence of an injury, the injured person shall give written notice to the licensee or permittee or such licensee's or permittee's insurance carrier of the person's intention to bring an action under this section, indicating the time, place and circumstances causing the injury. Such six months' period shall be extended if the injured party is incapacitated at the expiration thereof or unable, through reasonable diligence, to discover the name of the licensee, permittee, or person causing the injury or until such time as such incapacity is removed or such person has had a reasonable time to discover the name of the licensee, permittee, or person causing the injury.

The failure to provide notice as required by section 123.93 is fatal to a cause of action brought under the dram shop act. *Arnold v. Lang*, 259 N.W.2d 749, 751 (Iowa 1977).

There are three exceptions in section 123.93 to the requirement that notice must be provided within six months after an occurrence. *Grovijohn v. Virjon, Inc.*, 643 N.W.2d 200, 204 (Iowa 2002). The notice period may be extended if: (1) the injured party is incapacitated at the end of the six-month

period; (2) the injured party is unable, through reasonable diligence, to discover the name of the potential dram shop defendant; and (3) the injured party, through reasonable diligence, is unable to discover the identity of the person causing the injury. *Id.*

Veach did not provide notice to Prairie Meadows within six months after the incident on October 5, 2002. The six-month period ended on April 5, 2003. Veach did not provide notice to Prairie Meadows until May 1, 2003. She claims that she comes within the exceptions in section 123.93. She also claims Prairie Meadows had actual notice of her intent to file a dram shop action.

A. Veach asserts she was incapacitated for a period of time after the incident on October 5, 2002, and had to walk with a crutch until November 28, 2002. She claims the six-month period should be extended for the period of time she was incapacitated. Under the statute, however, Veach would have to be incapacitated at the end of the six-month period. *Grovijohn*, 643 N.W.2d at 204. Veach does not allege she was incapacitated on April 5, 2003. Therefore, she does not come within the first exception to section 123.93.

Furthermore, the supreme court has stated:

> We believe the legislature intended that claims of incapacitation be resolved on the basis of reasonableness. We think the section seeks to free the injured party from concerning himself with litigation until he is reasonably able to counsel with an attorney.

Harrop v. Keller, 253 N.W.2d 588, 592 (Iowa 1977). Here, Veach was able to hire an attorney on October 9, 2002, just a few days after the incident on October 5. Veach failed to show she was incapacitated to the extent she was not reasonably able to consult with an attorney. *See id.*

B. As to the second and third exceptions, Veach asserts that she exercised reasonable diligence, but was unable to ascertain in a timely manner whether Kinney was intoxicated at the time of the incident, and if he was intoxicated, whether he had been served alcohol at Prairie Meadows. She points out that she was unable to obtain a copy of the police report. She asserts she was "stonewalled" by the Altoona Police Department and the Polk County Attorney's Office because of Kinney's pending criminal trial.

Veach relies upon *Shasteen v. Sojka*, 260 N.W.2d 48, 52 (Iowa 1977), where the supreme court found "reasonable minds could differ on the crucial question of reasonable diligence," and determined the issue had properly been submitted to a jury. There, however, the plaintiff's attorney had: (1) sent a letter to the person who had caused the accident, Leroy Sanders; (2) inquired of Sanders's criminal attorney about the incident; (3) inquired of the county attorney about the incident; (4) sought to look at the county attorney's records; and (5) obtained a copy of the accident report. *Shasteen*, 260 N.W.2d at 52. The accident report did not indicate Sanders had been drinking, and the attorney was denied information from the other sources. *Id.*

In the present case, Stiles made limited inquiries. In a deposition, Severino stated that although he would not show Stiles his criminal file on Kinney, if Stiles had asked he would have shared the information that Kinney had been intoxicated and had been drinking at Prairie Meadows. The information that alcohol was involved in the incident was available from the preliminary complaint against Kinney and newspaper accounts.

Furthermore, when Stiles and Veach met with Severino on April 3, 2003, they were told Kinney's blood alcohol content was over the legal limit, and a videotape showed him drinking alcohol at Prairie Meadows. Stiles was asked about the meeting in his deposition, as follows:

> Q. Would it be fair to say that based upon that information, you would have enough information to provide a notice to Prairie Meadows under the Dram Shop? A. I think so.
> Q. And that was not done at that time, though, is that correct? A. No. It was done less than a month after that, yeah.

Thus, before the six-month period was completed on April 5, 2003, Veach had enough information to file the dram shop notice.

C. Finally, Veach asserts Prairie Meadows had actual notice she intended to file a dram shop action. She states Prairie Meadows was alerted to its potential dram shop liability when Klobnak filed suit in November 2002, and "the spirit and legislative intent of the notice provision of Iowa Code § 123.93 was served when Defendant was placed on notice of a Dram Shop claim by Klobnak."

Section 123.93 provides "the injured person shall give written notice . . . ." The statute does not provide for notice by other means. Actual knowledge was asserted in *Arnold*, 259 N.W.2d at 752, but the court found this assertion was not factually supported. The court also noted the defendant's "mere personal knowledge of the event would not alone serve to supply all informational elements which § 123.93 requires." *Arnold*, 259 N.W.2d at 752.

In *Berte v. Bode*, 692 N.W.2d 368, 370 (Iowa 2005), a guardian gave notice in his capacity as guardian for a minor, but did not give notice individually. The supreme court concluded the dram shop claim was solely for the benefit of

the minor. *Berte*, 692 N.W.2d at 370-71. Under this case, notice on behalf of one party cannot constitute notice on behalf of another party. *See id.* Prairie Meadows cannot be considered to have notice of Veach's suit based on Klobnak's notice.

We conclude the district court properly granted summary judgment to Prairie Meadows on the dram shop claim.

AFFIRMED.